

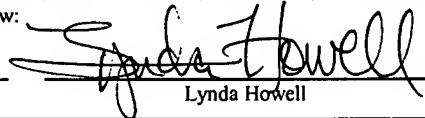
AF
SRW

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Re Application of:
Eric Michael Breitung et al.
Serial No.: 10/630,139
Filed: July 31, 2003
For: DELIVERY SYSTEM FOR
PECVD POWERED ELECTRODE

§
§
§ Group Art Unit: 1763
§
§ Examiner: Zervigon, Rudy
§
§
§ Atty. Docket: 121277-1/YOD
§ GERD:0598

Mail Stop Appeal Brief-Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

CERTIFICATE OF TRANSMISSION OR MAILING 37 C.F.R. 1.8	
I hereby certify that this correspondence is being transmitted by facsimile to the United States Patent and Trademark Office in accordance with 37 C.F.R. § 1.6(d), or is being transmitted via the Office electronic filing system in accordance with 37 C.F.R. § 1.6(a)(4), or is being deposited with the U.S. Postal Service with sufficient postage as First Class Mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on the date below:	
August 1, 2007 Date	 Lynda Howell

REPLY BRIEF

This is in response to the Examiner's Answer mailed on June 1, 2007.

As discussed in detail below, the Examiner has improperly rejected pending claims 1-18, which are the subject of this Appeal. Accordingly, Appellants respectfully request that the Board consider the following points that supplement those raised in the Brief and that respond to the Examiner's Answer.

Examiner's reference to provisional double patenting rejection

The Examiner provisionally rejected claims 1-18 under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-20 of copending Application No. 10/449,975. This rejection is irrelevant to the present Appeal,

and was not a ground for which Board review was sought. At any rate, in accordance with the MPEP § 804.B.1, if a provisional double patenting rejection is ultimately the last remaining rejection, it cannot be maintained. Therefore, in any event, if the provisional double patenting rejection becomes the last remaining rejection, it can easily be resolved in accordance with MPEP § 804.B.1.

Sole Ground of Rejection for Review on Appeal:

Appellants respectfully urge the Board to review and reverse the Examiner's rejection on claims 1-18 under 35 U.S.C. § 102 (b) as being anticipated by Countrywood et al. (U.S. patent no. 6,110,540 A, hereinafter, "Countrywood"). Of these, claims 1, 9 and 15 are independent.

The Examiner stated in the Examiner's Answer, that,

[i]n response to Applicant's [sic] new argument against Countrywood, is noted that although Countrywood teaches "cooling water" supplied through ports 122, 124, 126, 128, and 130 (Figure 3B; column 7; lines 15-23) the relative temperature of Countrywood's inlet line and Countrywood's plasma operating environment (Figure 1) may operate to heat Countrywood's inlet line (conduit for gas from 120; Figure 3B; column 6; line 34-column 6, line 23) and is thus capable of being heated by passing water (not part of Countrywood's structure) at a slightly higher temperature than the ambient processing temperature of Countrywood's reactor (Figure 1). This condition is likely present during start-up of Countrywood's reactor (Figure 1). When the structure recited in the reference is substantially identical to that of the claims, claimed properties or functions are presumed to be inherent. See page 9, lines 8-18.

The Examiner's argument is completely contrary to the expressed teachings of the reference that the ports are "cooling ports".

The foregoing argument is mere conjecture on the part of the Examiner. It is of course the Examiner's duty to give the broadest reasonable interpretation to the claims and to reasonably apply the prior art. However, it is completely *unreasonable* to read

“cooling water” to mean “heating water”. The Examiner’s exact contrary reading of Countrywood is patently absurd.

A cooling water system at the gas inlet would only defeat the purpose of a heated gas inlet line and would present cold areas that the heated gas inlet line eliminates. *See* Application, pages 3-4, paragraph 10. These cold areas are problematic because they allow the gas to condense and clog the gas inlet. *See, e.g., id.* at page 3, paragraph 8. Thus, the cold area (*i.e.*, the cooling system) disclosed in Countrywood would specifically counteract the heated gas inlet line element, and thus, can only be interpreted as explicitly teaching away from the claimed element of a heated gas inlet line.

Technically, the Examiner’s reading is not supported by the reference.

The Examiner stated that the relative temperature of Countrywood’s inlet line and Countrywood’s plasma operating environment may operate to heat Countrywood’s inlet line and is thus capable of being *heated by passing water* at a slightly higher temperature than the ambient processing temperature of Countrywood’s reactor.

It is unheard of in the art that water may be used to heat a plasma environment, and it would be completely absurd to make such an assumption. The Examiner bears the initial burden of setting out a reasonable basis for the rejection. Here, Appellants would submit that it is, or would appear to be technically impossible to provide water in Countrywood’s “cooling ports” that would be so hot as to heat the already heated inlet gasses. Appellants call upon the Board to reject this totally unreasonable conjecture on technical reasons alone.

The Examiner appears to make an inherency argument.

The Examiner appears to, for the first time, argue that Countrywood could, under certain conditions (*e.g.*, upon initial startup) inherently function as does the claimed

invention. This is, of course, mere conjecture. Further, this is a new argument raised by the Examiner. Moreover, an inherency argument requires that the claimed recitation *must be necessarily present*. According to MPEP § 2112 (IV):

The fact that a certain result or characteristic may occur or be present in the prior art is not sufficient to establish the inherency of that result or characteristic..."In relying upon the theory of inherency, the examiner must provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the applied prior art. MPEP §2112.IV, citing *Ex Parte Levy* 17 USPQ2d 1461, 1464 (Bd. Pat. App. & Inter. 1990) (emphasis in original).

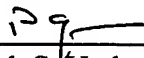
In other words, the reference must support the supposition that at any time in operation, the cooling ports must necessarily heat the fluid. Appellants would even be impressed if the Countrywood design would *necessarily ever* heat incoming gas with water during initial startup. Given the fact that heating by means of cooling water is *contrary to the plain teachings of reference*, the Examiner has failed to prove that the claimed operation would, in Countrywood's device, ever necessarily occur.

Conclusion

Appellants respectfully submit that all pending claims are in condition for allowance and urge the Board to reverse the outstanding rejections.

Respectfully submitted,

Date: 8/1/2007



Patrick S. Yoder
Reg. No. 37,479
FLETCHER YODER
P.O. Box 692289
Houston, TX 77269-2289
(281) 970-4545